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Supreme Court, U.S.
FILED

No. _____ 02 876 DEC 4 2002

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,

Petitioners,

v.

PHYLLIS GARRETT AND ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Appendix to
PETITION FOR WRIT OF CERTIORARI

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41 pp

APPENDIX A

SUPREME COURT OF ARKANSAS
No. 01-1190

TERESA BALLARD, ET AL., **APPELLANTS,** **VS.** **ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC., AND PHYLLIS GARRETT,** **APPELLEES,**	**Opinion Delivered JUL 05 2002** **APPEAL FROM THE CLARK COUNTY CIRCUIT COURT, NO. CIV 99-152 HON. JOHN ALEXANDER THOMAS JUDGE,** **DISMISSED.**

W.H. "DUB" ARNOLD, Chief Justice

This appeal arises from an order of the Clark County Circuit Court approving a settlement of all possible claims against appellee Advance America, Cash Advance Centers of Arkansas, Inc., and all of its officers, shareholders, and sureties for cash in the amount of $750,000 and forgiveness of approximately $550,000 in checks it held that had been returned unpaid due to insufficient funds.

The case began as a class action usury suit that was filed by appellee, Phyllis Garrett, against appellee, Advance America Cash Advance Centers of Arkansas, Inc., on October 12, 1999. On April 9, 2001, a conditional settlement class was certified, and on May 2, 2001, a proposed settlement agreement was preliminarily approved, and notice was given to class members. This notice informed the members that a fairness hearing would be held on July 18,

2001, and that potential class members were given until June 30, 2001, to opt out of the class.

Appellants, Teresa Ballard, Cheryl King, and Kenisha Bryant, filed a motion seeking to intervene in the action on July 6, 2001. On July 16, 2001, a hearing was held on appellants' motion. On July 18, 2001, the trial court found that appellants' motion to intervene was untimely, that appellants' interest was adequately represented, and the trial court denied the motion to intervene.

On July 18, 2001, the previously scheduled fairness hearing was held. Following the fairness hearing, the settlement was approved and appellants' appealed from the trial court's denial of their motion to intervene. This court affirmed the trial court in *Ballard v. Garrett*, ____ Ark. _____S.W.3d ____ (June 20, 2002).

In that case, this court upheld the trial court's order that appellants' motion to intervene was filed after the litigation had progressed too far, and held that there was no abuse of discretion by the trial court. *Id.* We stated that appellants sat on their rights and waited until they were not satisfied with the way the litigation was progressing. *Id.* We concluded that the trial court did not abuse its discretion when it determined that the proceedings had advanced so far that appellants' motion to intervene was not timely. *Id.* Further, we found that allowing the intervention would have delayed the entry of the proposed settlement and would have delayed the class members' ability to collect their compensation. *Id.* Finally, in that case, we concluded that appellants did not have a valid reason for delaying the filing of their motion to intervene until fifteen months after the litigation had begun or two months after a proposed settlement had been reached. *Id.* Accordingly, we held that the trial court did not err in denying appellants' motion.

Therefore, in *Ballard v. Garrett*, we held that the trial court did not abuse its discretion when it found that appellants' motion to intervene was untimely. This court

stated the trial court did not abuse its discretion because (1) appellants waited until the litigation had progressed too far before they filed their motion to intervene; (2) the granting of appellants' untimely motion would have caused the other parties to the litigation to suffer prejudice; and (3) appellants failed to provide a valid reason for their delay in filing their motion to intervene.

While *Ballard v. Garrett* was pending before this court, Teresa Ballard, Cheryl King, and Kenisha Bryant filed another appeal with this court, also from Clark County Circuit Court. In this appeal, appellant raised four points: (1) the trial court abused its discretion in finding that the settlement agreement was fair, reasonable, and adequate; (2) the trial court abused its discretion in naming Garrett as class representative and naming her attorneys as class counsel; (3) the trial court erred in admitting and excluding certain evidence; and (4) the trial court erred in quashing the appellants' subpoena on Advance America, denying them the right to cross-examine witnesses and refusing to allow them to review and argue from a plaintiff's sealed exhibit.

However, because we found appellants did not timely intervene, appellants do not have standing to bring this appeal. In *Devlin v. Scardelletti et al.*, WL 1270617 (June 10, 2002), the United States Supreme Court determined that unnamed class members, who have objected in a timely manner to approval of a class action settlement at the fairness hearing, have the power to bring an appeal without first intervening, abrogating the lack of standing issue. However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure. In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead

elected to object to the settlement and risk being bound by it, if approved by the court over their objections.

Accordingly, the *Devlin* opinion is distinguishable from this case on appeal, and this court's opinion in *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994), continues to be the controlling precedent in Arkansas. In *Haberman*, the court found that for unnamed class members to have standing to appeal a class-action settlement in state court, those class members must have intervened at the trial court level. *Haberman, supra.* Non-parties and unnamed members of the class who have failed to intervene are precluded from appealing a class settlement. *Haberman, supra.*

Throughout this litigation, appellants have conceded that *Haberman* is the applicable and controlling law. At a hearing before the circuit court on September 5, 2001, counsel for appellants stated "[t]he Haberman decision from the Arkansas Supreme Court makes it very clear that in order for a party to appeal a settlement agreement, they must be an intervenor. That is the law." Appellants have now changed their position and suggest that *Devlin* gives them the ability to appeal the settlement approval in this case without first intervening. We disagree and continue to follow *Haberman*.

Unlike the petitioner in *Devlin*, appellants here had the ability to opt out of the settlement and avoid being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants willingly undertook the risk that their motion to intervene might be denied for failure to meet the requirements of Rule 24(a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this

appeal. Therefore, by following *Haberman*, appellants have no standing; thus the appeal is dismissed.

Appeal dismissed.

GLAZE, J., not participating.

APPENDIX B

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS

PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons — PLAINTIFF

CIV-99-152

VS.

ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC. — DEFENDANT

(Filed July 18, 2001)

FINAL JUDGMENT AND ORDER OF DISMISSAL

This matter came on for hearing on July 18, 2001, upon the application of counsel for the Parties for Final Approval of the settlement set forth in the Class Settlement Stipulation dated May 2, 2001 (the "Settlement Stipulation"). Due and adequate notice having been given to the Conditional Settlement Class defined below, and the Court having considered the Settlement Stipulation, all papers filed and proceedings had herein and all oral and written objections and comments received regarding the proposed settlement, and good cause having been shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLOWS:

1. For purposes of this final Judgment and Order of Dismissal (the "Final Judgment"), the court adopts and incorporates herein by reference all defined terms set forth in the Settlement Stipulation.

2. Upon joint motion of the Parties and upon finding that all requirements of Arkansas Rule of Civil Procedure 23(a) and (b) are satisfied, the Court certified a Conditional Settlement Class on April 9, 2001, for settlement purposes only. The Conditional Settlement Class consists of all customers who have engaged in Check Cashing Transactions with Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America'), pursuant to the Arkansas Check Cashers Act, exclusive of any customers who have timely requested exclusion from the Conditional Settlement Class under Arkansas Rule of Civil Procedure 23 and the terms of the Settlement Stipulation. The Settlement Period is June 1, 1999, through and including May 15, 2001.

3. The Court further finds that Plaintiff, Phyllis Garrett, and Class Counsel, Todd Turner, are adequate class representatives under Arkansas Rule of Civil Procedure 23(a)(4).

4. The Court approves the Parties' designation of Bowman and Brooke LLP, Post Office Box 584, Richmond, Virginia 23218-0584, as Claims Administrator.

5. The Court finds that the mailing and posting of the Notice of Pendency and Settlement of Class Action (the "Notice"), in accordance with the Notice Order entered on May 2, 2001, constitute the best notice practicable under the circumstances to all persons who are members of the Conditional Settlement Class, and fully satisfies the requirements of Arkansas Rule of Civil Procedure 23(c), due process under the Arkansas and United States Constitutions and any other applicable law.

7. Pursuant to and in accordance with the requirements of Arkansas Rule of Civil Procedure 23(e), the

Court approves the settlement of the Litigation as set forth in the Settlement Stipulation, and each of the releases and other terms set forth therein, as fair, reasonable and adequate to the Conditional Settlement Class. The Parties to the Settlement Stipulation shall complete and finalize the settlement in accordance with the terms of the Settlement Stipulation.

8. Except for claims by persons who have validly and timely requested exclusion from the Conditional Settlement Class, all claims that are asserted, or could have been asserted, in the Litigation against Advance America or Related Parties are dismissed with prejudice, with each Party bearing their own costs.

9. Each member of the Conditional Settlement Class is hereby deemed to have fully, finally and forever released and discharged all Released Claims against all Released Persons, whether or not such class member files a Proof of Claim with the Claims Administrator. The Released Claims include, without limitation, all claims, demands, rights, liabilities and causes of action of every kind and description whatsoever, whether known or unknown, that are asserted or could have been asserted in the Litigation against any of the Released Persons arising out of Check Cashing Transactions conducted by Advance America or Related Parties during the Settlement Period, including without limitation, all claims of: usury, unlawful, unfair or deceptive trade practices under state or federal law; violation of the federal Fair Debt Collection Practices Act, other federal law or state law dealing with unfair or improper collection practices; violation of the federal Racketeering Influenced and Corrupt Organizations Act or similar state law; conspiracy, violation of the federal Truth in Lending Act, other federal law or state law dealing with disclosure of credit terms; violation of the federal Equal Opportunity Credit Act or similar state law; violation of the federal Fair Credit Reporting Act or similar state law; violation of the federal Financial Right to Privacy Act or similar state law; violation of the Arkansas Check Cashers Act or any regulation promulgated thereunder; breach of contract; negligence; gross negligence; fraud or misrepresentation;

unconscionability; intentional, willful or wanton conduct; punitive damages; contribution; indemnification; and all other alleged violations of federal, state, or local statutes, constitutional provisions, rules, regulations or common law arising out of Check Cashing Transactions conducted during the Settlement Period.

10. In accordance with the Settlement Stipulation, all members of the Conditional Settlement Class are hereby ordered to dismiss with prejudice all actions, lawsuits, or claims filed or brought in their own names, or as putative class representatives, in any other court, administrative tribunal or other forum, asserting any of the Released Claims against any of the Released Persons.

11. All members of the Conditional Settlement Class are permanently barred and enjoined from filing or prosecuting, in any capacity and in any court, administrative tribunal or other forum, any action or proceeding with involves or asserts any of the Released Claims against any of the Released Persons.

12. Advance America is hereby deemed to have fully, finally and forever released and discharged each member of the Conditional Settlement Class from any claims, lawsuits, or causes of action relating to or arising out of NSF Transactions that were unpaid as of May 2, 2001, the date of the Settlement Stipulation.

13. In accordance with the Settlement Stipulation, Advance America is ordered to dismiss with prejudice the arbitration appeal currently pending in this action before the Arkansas Supreme Court, and to dismiss with prejudice any collections actions or appeals of collections actions that are currently pending in Arkansas courts between Advance America and any member of the Conditional Settlement Class.

14. All persons who have filed valid and timely Requests for Exclusion from the Conditional Settlement Class

are identified on Schedule "A" attached hereto and shall not be bound by this Final Judgment or the Settlement Stipulation.

15. The Court approves as fair and reasonable Class Counsel's attorneys fees and costs as set forth in the Settlement Stipulation, which shall be paid by the Claims Administrator from the cash contribution made by Advance America to fund the settlement.

16. The Court retains continuing jurisdiction over the Litigation, the Plaintiff, the Conditional Settlement Class and the Defendant for the purposes of supervising the implementation, enforcement, construction and interpretation of the settlement Stipulation.

"s/John A. Thomas"
Circuit Court Judge
Date: July 18, 2001

Filed for Record 18th
day of July 2001 at
4:00pm O'Clock by
"s/Pamela King"
PAMELA D. KING,
~~Deputy~~ Clerk

APPROVED AND AGREED:

"s/Todd Turner"
TODD TURNER, Esquire (#92266)
Morgan & Turner
P.O. Box 579
Arkadelphia, Arkansas 71923
Phone: (870) 246-9868

Class Counsel

"s/Claire Hancock"
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"s/Robert M. Buell:"
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Attorneys for Advance America,
Cash Advance Centers of Arkansas, Inc.

APPENDIX C

Leslie W. Steen, Clerk

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

September 5, 2002

David Glen Nixon
Paige E. Young
The Nixon Law Firm
2340 Green Acres Road, Suite 12
Fayetteville, AR 72703

RE: 01 1190 Teresa Ballard et al. v. Advance America et al.

Dear Attorneys:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied. Glaze, J., not participating."

Sincerely,

"s/Leslie W. Steen"
Leslie W. Steen, Clerk

LWS:jko

cc: Claire S. Hancock

Todd M. Turner
Richard A. Fisher
Jimmy W. Bilbo
Robert M. Buell
Betty L. Clower, clerk
(CIV-99-152)

APPENDIX D

IN THE SUPREME COURT OF ARKANSAS

TERESA BALLARD; KENISHA BRYANT;
CHERYL KING; and CRYSTAL LUEBBERS APPELLANTS

PHYLLIS GARRETT, individually, and o/b/o No. 01-1190
a class of similarly situated persons; and
ADVANCE AMERICA, CASH ADVANCE CENTERS OF
ARKANSAS, INC. APPELLEES

(FILED JUNE 12, 2002)

Motion To Take Judicial Notice

COME NOW, Teresa Ballard, Kenisha Bryant, and Cheryl King, Appellants herein, by and through their attorneys of record, THE NIXON LAW FIRM, and in support of their motion would show the Court as follows:

1. That currently pending before this Court is Appellants' appeal of the approval of settlement in *Luebbers v. Advance America Cash Advance Centers of Arkansas, Inc.* (Appeal No. 01-1190).

2. That Appellees have argued that this Court should apply *Haberman, infra* and *Croyden, infra* and dismiss this appeal because Appellants are without standing to appeal this issue because they are not parties who may take independent action in the underlying class action, Appellants having been denied intervention which has not yet been reversed by this Court.

3. That this Court in its opinion in the case of *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994) relied on *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992) for the premise that unnamed class members lack standing to appeal a decision approved by the class representatives.

4. That on June 10, 2002, the United States Supreme Court issued its opinion in *Devlin v. Scardelletti, et al.*, 536 U.S. _____(2002)[1] and determined that unnamed class members who have objected in a timely manner to approval of a class action settlement at the fairness hearing have the power to bring an appeal without first intervening, abrogating the "lack of standing" issue advanced by *Croyden* and *Haberman*. The U.S. Supreme Court's opinion is submitted contemporaneously with this motion.

5. That Appellants meet the tests set forth in *Devlin v. Scardelletti, et al., id.* permitting them to appeal an adverse determination in the trial court.

6. That Appellants respectfully request leave to supplement their prior filings in this proceeding to bring to the attention of this Honorable Court this recent decision by the United States Supreme Court, which has a direct bearing upon the issues pending in this matter.

WHEREFORE, premises considered, the Petitioners Teresa Ballard, Kenisha Bryant, and Cheryl King respectfully request this Court to take judicial notice of the United States Supreme Court decision of *Devlin v. Scardelletti, et al.*, 536 U.S. _____(2002) which has a direct bearing on the issues before this Court and to grant them such other and further relief to which they may be entitled.

Respectfully Submitted:
"s/David G. Nixon
David G. Nixon (ABA #88048)
Paige E. Young (ABA #99123)

---

[1] 2002 WL 1270617

THE NIXON LAW FIRM
2340 Green Acres Road, Suite 12
Fayetteville, AR 72703
Phone: (501) 582-0020
Fax: (501) 582-0030

Attorneys for Appellants Teresa Ballard, Kenisha Bryant, and Cheryl King

Certificate of Service

I, David G. Nixon, do hereby certify that on the 11th day of June 2002 I caused a true and correct photocopy of the within and foregoing document, with exhibits, if any, to be served on those persons shown below via U.S. First Class Mail, to wit:

Hon. John A. Thomas
CLARK COUNTY CIRCUIT JUDGE
P O Box 966
Arkadelphia, AR 71923

Todd Turner
MORGAN & TURNER
201 N. 10th Street
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Arkadelphia, Arkansas 71923

Claire Hancock
WRIGHT, LINDSEY & JENNINGS LLP
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Little Rock, Arkansas 72201-3699

Robert M. Buell
BOWAN and BROOKE LLP
Riverfront Plaza - West Tower
901 East Byrd Street, Suite 1500
Richmond, Virginia 23219

"s/David G. Nixon"
David G. Nixon

IN THE SUPREME COURT OF ARKANSAS

TERESA BALLARD; KENISHA BRYANT;
CHERYL KING; and CRYSTAL LUEBBERS
APPELLANTS

No. 01-1190

PHYLLIS GARRETT, individually, and o/b/o
a class of similarly situated persons; and
ADVANCE AMERICA, CASH ADVANCE CENTERS
OF ARKANSAS, INC. APPELLEES

Brief in Support of Motion To Take Judicial Notice

COME NOW, Teresa Ballard, Kenisha Bryant, and Cheryl King, Appellants herein, and submit this Brief in support of their motion filed contemporaneously herewith:

1. **Appellants are parties for the purposes of appealing approval of the settlement.**

Currently pending before this Court is Appellants' appeal of the settlement in *Luebbers v. Advance America Cash Advance Centers of Arkansas, Inc.*, (Appeal No. 01-1190). Appellants are unnamed class members who were denied their motion to intervene and who had filed their notice of objections to the proposed settlement on July 6, 2001. Despite the objections entered during the fairness hearing of July 18, 2001, the trial court approved the settlement as it had been proposed, from which this appeal follows.

Appellees argue that this appeal should be dismissed pursuant to *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994) (unnamed class members lack standing to appeal a decision approved by the class representatives where Appellants' motion to intervene had been denied by the trial

court). *Haberman* was an extension of the precedent set by the Eighth Circuit Court of Appeals in *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992). Appellants submit that a recent decision by the United States Supreme Court has abrogated the premise upon which *Croyden* and *Haberman* stand, and submit the *Devlin* decision to the Court.

In *Devlin v. Scardelletti, et al.*, 2002 WL 1270617, 536 U.S. ___ (2002), the United States Supreme Court directly addresses the issue of whether a unnamed class member, whose motion to intervene was denied at the trial court, has the power to bring an appeal without first intervening. The Court found that, contrary to the position held by some circuits and embraced by *Croyden* and *Haberman*, the issue was not one of standing because appellant had not been successful in intervening, but rather whether the Appellant was a party for purposes of appealing the settlement approval. The *Devlin* Court held that an unnamed class member who had timely objected to approval of a settlement at a fairness hearing has the power to bring an appeal without first intervening, abrogating the precedent of *Croyden* and *Haberman*.

Devlin is directly on point to the situation faced by Appellants. Appellants moved to intervene and were denied by the trial court. They filed timely objections and raised those objections at the fairness hearing. Therefore, Appellants have the power to bring an appeal without first intervening. This Court should not dismiss this appeal.

2. Conclusion

For all of the above reasons, Appellants request that the Court take judicial notice of the recent United States Supreme Court decision which has a direct bearing upon the issues pending in this matter and grant them such other and further relief to which they may be entitled.

Certificate of Service

I, David G. Nixon, do hereby certify that on the 11th day of June 2002 I caused a true and correct photocopy of the within and foregoing document, with exhibits, if any, to be served on those persons shown below via U.S. First Class Mail, to wit:

Hon. John A. Thomas
CLARK COUNTY CIRCUIT JUDGE
P O Box 966
Arkadelphia, AR 71923

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"s/David G. Nixon"
David G. Nixon

APPENDIX E

U. S. CONSTITUTION, AMENDMENT V. GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONSTITUTION, AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But

Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

A.C.A. § 16-11-302

ARKANSAS CODE OF 1987 ANNOTATED

TITLE 16. PRACTICE, PROCEDURE, AND COURTS

SUBTITLE 2. COURTS AND COURT OFFICERS

CHAPTER 11. SUPREME COURT

SUBCHAPTER 3. PROCEDURAL RULES

16-11-302. Pleading, practice, and procedure in civil cases.

(a) The Supreme Court of Arkansas shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any and all proceedings in civil cases in all courts in this state. However, the court shall not have the power to prescribe rules in conflict with laws of this state relating to stays and continuances of proceedings in suits in which a member of the General Assembly, an officer of the General Assembly, or a designated employee of the General Assembly is an attorney or a party in the proceeding.

(b) The rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by Arkansas Constitution, Article 2, § 7, as amended by Arkansas Constitution, Amendment 16.

(c) The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as authorized in this section may prescribe the times for, and manner of, taking appeals.

(d) The Supreme Court may fix the dates when these rules shall take effect and the extent to which they shall apply to proceedings then pending.

(e) All laws in effect on July 24, 1973, regarding pleading, practice, and procedure in civil proceedings in the courts of

this state and those relating to the time and manner of taking appeals in civil proceedings shall remain in effect only until such time as the Supreme Court prescribes rules regarding them or until the laws are repealed or revised by legislative action.

(f) Nothing in this section, anything herein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules previously prescribed by the Supreme Court.

History. Acts 1973, No. 38, §§ 1-6; 1979, No. 333, § 2; 1981, No. 312, § 3; A.S.A. 1947, §§ 22-245 -- 22-249, 22-249n.

A.C.A. § 16-65-119

ARKANSAS CODE OF 1987 ANNOTATED

TITLE 16. PRACTICE, PROCEDURE, AND COURTS

SUBTITLE 5. CIVIL PROCEDURE GENERALLY

CHAPTER 65. JUDGMENTS GENERALLY

SUBCHAPTER 1. GENERAL PROVISIONS

16-65-119. Reversal, modification, or vacation of judgment.

(a) A judgment rendered, or final order made, in the circuit or chancery court may be reversed, vacated, or modified, either by the Supreme Court or by the court in which the judgment was rendered, or order made.

(b) A judgment or final order may be reversed or modified by the Supreme Court for errors appearing in the record.

(c) The proceedings to obtain the reversal or modification shall be by appeal, prosecuted as prescribed by law.

History. Civil Code, §§ 566-568; C. & M. Dig., §§ 6285-6287; Pope's Dig., §§ 8241-8243; A.S.A. 1947, §§ 29-501 -- 29-503.

RULE 23. CLASS ACTIONS.

* * *

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section may be conditional and it may be altered or amended before the decision on the merits.

(c) Notice. In any class action in which monetary relief is sought, including actions for damages and restitution, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall: (1) describe the action and the members' rights in it; (2) advise each member that the court will exclude the member from the class if the member so requests by a specified date; (3) advise each member that the judgment, whether favorable or not, will include all members who do not request exclusion; and (4) state that any member who does not request exclusion may, if the member desires, participate in the litigation, either in person or through counsel. The cost of such notice shall be borne by the representative parties; provided, however, that the court may shift all or part of such

cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits.

* * *

ARKANSAS RULES OF APPELLATE PROCEDURE - CIVIL

RULE 2. APPEALABLE MATTERS; PRIORITY

(a) An appeal may be taken from a circuit court to the Arkansas Supreme Court from:

1. A final judgment or decree entered by the circuit court;

2. An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action;

3. An order which grants or refuses a new trial;

4. An order which strikes out an answer, or any part of an answer, or any pleading in an action;

5. An order which vacates or sustains an attachment or garnishment;

6. An interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused;

7. An interlocutory order appointing a receiver, or refusing to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder;

8. An order which disqualifies an attorney from further participation in the case;

9. An order granting or denying a motion to certify a case as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure;

10. An order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official;

11. An order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the circuit court has directed entry of a final judgment as to one or more but fewer than all of the claims or parties and has made an express determination, supported by specific factual findings, that there is no just reason for delay, and has executed the certificate required by Rule 54(b) of the Rules of Civil Procedure; and

12. An order appealable pursuant to any statute in effect on July 1, 1979, including Ark. Code Ann. § 16-108-219 (an order denying a motion to compel arbitration or granting a motion to stay arbitration, as well as certain other orders regarding arbitration) and § 28-1-116 (all orders in probate cases, except an order removing a fiduciary for failure to give a new bond or render an accounting required by the court or an order appointing a special administrator).

(b) An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment.

(c) Appeals in juvenile cases shall be made in the same time and manner provided for appeals from circuit court.

1. In delinquency cases, the state may appeal only under those circumstances that would permit the state to appeal in criminal proceedings.

2. Pending an appeal from any case involving a juvenile out-of-home placement, the circuit court retains jurisdiction to conduct review hearings.

3. In juvenile cases where an out-of-home placement has been ordered, orders resulting from the hearings set below are final appealable orders:

(A) adjudication and disposition hearings;

(B) review and permanency planning hearings if the court directs entry of a final judgment as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P., Rule 54(b); and

(C) termination of parental rights.

(d) All final orders awarding custody are final appealable orders.

(e) Appeals in criminal cases have priority over all other business. With respect to civil cases, appeals under subdivisions (a)(6), (a)(7), (a)(9), (c)(3), and (d) of this rule take precedence.

[Effective January 1, 1996; amended effective March 4, 1999; amended effective January 27, 2000; amended effective February 1, 2001; amended effective July 1, 2001.]

APPENDIX F

IN THE SUPREME COURT OF ARKANSAS

[Filed JUL 23, 2002]

TERESA BALLARD, KENISHA BRYANT and CHERYL KING,	**APPELLANTS**
v.	**NO. CA 01-1190**
PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons; and ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC.,	**APPELLEES**

PETITION FOR REHEARING

COME NOW, TERESA BALLARD, KENISHA BRYANT, and CHERYL KING, Appellants herein, and petition the Court for rehearing of their decision entered July 5, 2002, dismissing the Appeal in this matter.

1. Having long held that Arkansas Rule of Civil Procedure 23 will be interpreted in the same manner as its Federal counterpart, the Court now seeks to distinguish portions of Rule 23(b) from its federal counterpart, which will result in inconsistent application of the Rule.

2. At the time Appellants sought to intervene, *Haberman* was controlling, but submit that it is not now controlling because of *Devlin v. Scardelletti, et al.*, 2002 WL 1270617, 122 S. Ct. 2005, 536 U.S. ____(2002).

3. The presence of an opt-out provision does not undermine the power of an unnamed class member, having timely objected but being unsuccessful in intervening, to bring an appeal challenging the fairness of a class settlement. *Henderson v. General American Life Insurance Co.*, 122 S. Ct.2584 (2002).

WHEREFORE, Appellants respectfully request that the Court rehear and reconsider their decision of July 5, 2002 and that they grant the relief requested by the Appellants.

BRIEF IN SUPPPORT OF PETITION FOR REHEARING

COME NOW, TERESA BALLARD, KENISHA BRYANT, and CHERYL KING, Appellants herein, and submit this Brief in support of their Petition for Rehearing filed contemporaneously herewith:

The Court issued its Order on July 5, 2002, dismissing Appellants' appeal in this matter and cited three reasons:

(a) That the United States Supreme Court's decision in *Devlin, infra,* could be distinguished because *Devlin* addressed a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law;

(b) That because Appellants had previously argued that *Haberman, infra,* was controlling as to the issues of intervention and standing, Appellants could not now argue that *Haberman* was not controlling;

(c) That *Devlin* could be further distinguished because the settlement there had not contained any provision for opting-out; therefore, *Devlin*, did not apply and Appellants were without standing to appeal.

Appellants respectfully request that the Court reconsider its July 5, 2002 order for the following reasons.

This Court has long held that Arkansas Rule of Civil Procedure 23 will be interpreted in the same manner as its federal counterpart. *Williamson v. Sanofi Winthrop Pharmaceuticals, Inc.*, 347 Ark 89, 60 S.W.3d 428, 434 (2001) ("Rule 23 of the Arkansas Rules of Civil Procedure is comparable to Rule 23 of the Federal Rules of Civil Procedure, and this court interprets our Rule 23 in the same manner as the federal courts interpret the federal counterpart."); *Fraley v. Williams Ford Tractor and Equipment Co.*, 339 Ark. 322, 336, 5 S.W.3d 423, 432 (1999) ("We have said that we will interpret Ark. R. Civ. P. 23 in the same manner the federal courts interpret the comparable Fed R. Civ. P. 23."); *Union National Bank v. Barnhart*, 308 Ark. 190, 197, 823 S.W.2d 878, 881 (1992) (" in analyzing cases under our old rule, we have held that 'the spirit of the federal rule is to be found in our Rule 23 even if all the words are not,' and that 'both set out the same basic requirements for a class action.'" quoting *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 199, 801 S.W.2d at 36, 39 (1990)). *See also Baker v. Wyeth-Ayerst Laboratories Division*, 338 Ark. 242, 992 S.W.2d 797 (1999) (comparing the similarities between Ark. R. Civ P. 23(b) and Fed. R. Civ. P. 23(b)).

Now with its decision in *Ballard v. Advance America*, _____ Ark. ____, _____ S.W.3d_____ (July 5, 2002), the Court appears to establish a distinction between Ark. R. Civ. P. 23(b) and its federal counterpart. "Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure", but the Court provides no guidance as to which part of Ark. R. Civ. P 23(b) will no longer be interpreted in the "spirit of the federal rule ... even if all the words [are] not [found]."

While it is true that Appellants agreed that at the time intervention was sought that *Haberman* controlled whether an unnamed class member had standing to bring an appeal having been unsuccessful in their motion to

intervene, Appellants believe that *Devlin* has called into question the precedent upon which the *Haberman* decision was based, and Counsel for Appellants have a responsibility to their clients and the Court to bring the issue to the attention of the Court.

Furthermore, the Court's July 5, 2002 Order dismissing this appeal should be reconsidered in light of *Henderson v. General American Life Insurance Co.*, 122 S. Ct. 2584 (2002). In *Henderson*, the Supreme Court of the United States reversed and remanded *In re General American Life Ins. Co. Sales Practices Litigation*, 268 F.3d 627 (8th Cir. 2001) and instructed the Eighth Circuit Court of Appeals to reconsider their dismissal of *Henderson's* appeal in light of *Devlin v. Scardelletti*, 122 S.Ct. 2005 (2002). In *General American*, the Court of Appeals had relied on the *Croyden, infra*, precedent that an unnamed class representative must first intervene and achieve the status of a "party" in order to have standing to appeal the fairness of a class settlement. *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992).

Henderson, an unnamed class member in *General American*, had been denied intervention, had timely objected to the fairness of the settlement, but had not opted out under the settlement opt-out provisions. In *Henderson*, the Supreme Court of the United States did not deny Henderson's ability to appeal the fairness of the settlement based on the availability of opt-out provisions contained in the settlement. In light of the Supreme Court's most recent decisions regarding an unnamed class member's opportunity to appeal the fairness of a settlement, this Court should reconsider and set aside the Order dismissing Appellants' appeal in this matter.

Finally, this petition for rehearing should be granted to clarify the Court's statement that "Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal." The inference is that if Appellants had, in fact, opted-out of the settlement they would have had standing to appeal the fairness of the

settlement. Traditionally, opting-out has removed that person as a class member, and it would seem to *remove* any standing that person might have had to object to or appeal the fairness of a settlement. The statement implies that a person opting out of a settlement - a non-class member - would have the requisite standing necessary to pursue an appeal addressing the fairness of the settlement when an unsuccessfully intervening class member - now subject to the terms of the settlement and the principles of *res judicata* - is denied the same opportunity.

Conclusion

The Court should grant the rehearing, set aside their decision of July 5, 2002 dismissing the appeal, and grant Appellants the relief they have requested.

Certificate of Counsel

The undersigned hereby certifies his belief that there is merit in this Petition for Rehearing and that it is not filed for the purpose of delay.

Respectfully submitted:
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Certificate of Service

I, David G. Nixon, do hereby certify that on the 22nd day of July 2002 I caused a true and correct photocopy of the within and foregoing document, with exhibits, if any, to be served on those persons shown below via U.S. First Class Mail, to wit:

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